STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 15, 2011
v	No. 298033 Calhoun Circuit Court
REGINALD WALLS, Defendant-Appellant.	LC No. 2009-003955-FC

Before: FITZGERALD, P.J., and O'CONNELL and METER, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of second-degree murder, MCL 750.317. The trial court, applying a fourth-offense habitual offender enhancement under MCL 769.12, sentenced him to 45 to 70 years' imprisonment. We affirm.

The victim, defendant's former girlfriend, was stabbed six times in the parking lot of a store on August 15, 2009, and she died as a result. Derrice Smith observed the stabbing and testified that defendant was the perpetrator. At defendant's residence, the police found clothing with plant matter that matched a plant near the stabbing scene. They also found apparent blood spots in the residence. Shelly Payne testified that defendant told her multiple times that he was going to kill the victim. According to Payne, defendant was upset about his breakup with the victim and did not like the fact that the victim was free to "be herself" and "do her thing." The prosecutor introduced evidence that defendant had been violent against the victim in the past.

Defendant gave varying stories to the police. He first denied being at the scene of the stabbing. He later admitted being at the scene and said that the victim attacked him with a knife and that he slashed her; he implied that this slashing was an accident or defensive in nature. He admitted at trial, however, that a surveillance video shows the perpetrator making about six stabbing motions, and he admitted that in the video, it appears that the person who stabbed the victim "wasn't retreating, he was charging" and was intending to kill the victim. Defendant changed his story again at trial, claiming that he was not at the scene at the time in question but that he had gotten into a confrontation with the victim at another location. He testified that the victim swung a knife at him and that he "pushed her back" but did not cut her.

The jury ultimately rejected the charge of first-degree murder and convicted defendant of second-degree murder.

On appeal, defendant first argues that the trial court erred in allowing the prosecutor[1] to present a witness that had not been listed on the initial witness list. We review this issue for an abuse of discretion. *People v Burwick*, 450 Mich 281, 291; 537 NW2d 813 (1995).

On March 9, 2010, the prosecutor filed a "motion to add witness." The motion indicated that a detective, assisted by assistant prosecutor Jeffrey Kabot, had interviewed a jail inmate, Ricardo VanPelt, on February 23, 2010, and VanPelt stated that defendant, while in jail, had told him he killed a woman named "Pinky" because the woman was trying to "leave [him]." The motion indicated that Kabot "has been involved in the preparation for and current trial of a separate homicide in Calhoun County, since he received the information regarding Mr. VanPelt, leading to the delay in requesting the addition of Mr. Van[P]elt as a witness for the People."

The motion hearing took place on the first day of trial, March 11, 2010 (a Thursday), before jury selection. At the hearing, the prosecutor stated that "the report was made available to us from the Battle Creek Police as of March 2nd, and we ourselves have just recently spoken with Mr. VanPelt within the last 4 hours." The prosecutor claimed that defense counsel had been informed of the witness on Friday, March 5, but counsel claimed that he first learned of him on Tuesday, March 9. Defense counsel also questioned why there had been such a significant delay in adding the potential witness if the interview of him took place on February 23 as stated in the written motion. Counsel also noted that he had not yet had a chance to interview VanPelt.

The prosecutor, in response to defense counsel's argument, stated that "[t]hese reports are done from the Battle Creek Police Department, and again as I stated, we didn't even have access to the report and the information itself, and I'm acting in good faith until March 2nd.

The trial court stated that VanPelt's proposed testimony "involves a matter of great significance" and indicated that he would give defense counsel "the opportunity to look further into this . . . ." The court stated that it would rule at a later time.

The parties and the court revisited the issue on March 12, the second day of trial, with the court stating that "[t]here have been some discussions off the record with counsel about this." The prosecutor argued that defense counsel had spoken with VanPelt and that the late addition of VanPelt as a witness would not be prejudicial because there had been no witnesses to the alleged conversation between VanPelt and defendant. Defense counsel argued:

> I have had a chance to talk with Mr. VanPelt. He did say there were other people around in the [prison yard], however not when he allegedly was walking and talking with my client. The best he can narrow it down timeframe to me was maybe the last month of his sentence. He got out September 12th, so he couldn't narrow it down more than a month. I . . . still argue that . . . this is very prejudicial with the surprise element of it. Given more time [I] could have drawn

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[1] From the record, it appears that various prosecutors took part in prosecuting this case. For ease of reference, we will use the singular term "prosecutor" in this opinion.

up any . . . or could have talked to the jail about any potential videotapes that they have of the yard, gone through those. I'm sure they would have kept schedules of when people were released to go outside. Anybody else that would have been in the yard to see if they heard or didn't hear anything, as well as anybody who may or may not have heard it inside.

The trial court ruled:

> The earliest that this witness would testify would be Tuesday . . . the 16th, approximately one week after . . . [counsel] became aware of the request to add the witness, and of the substance of the witnesses [sic] testimony from the police report provided, along with the motion. In the final analysis, I'm satisfied that there is not sufficient prejudice at this point, given now the full week that [counsel] has to prepare for the testimony of this witness, having talked to the witness and having had at least the opportunity to make some further inquiry about it . . . . It does not appear to me there's sufficient evidence to find the People were in any way dilatory in disclosure thereof, and nor does it appear that the witnesses [sic] identity and the proposal that the witness testify was withheld for the purpose of intentionally prejudicing or surprising the defense. I'm going to permit the addition of the witness understanding for the record, that [counsel] will now have the full weekend and – including Monday when this [c]ourt is not in session, to make whatever further inquiry he wishes of the Sheriff's Department. And [counsel], if you need assistance of the [c]ourt in facilitating that, you may certainly make that request without the necessity of a written pleading.

We find no basis for reversal with respect to this issue. MCL 767.40a(4) states that "the prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." The "good cause" for filing the motion on March 9, 2010, is not entirely clear here, given that, according to the prosecutor's motion, the information was available to someone in the prosecutor's office on February 23, 2010. However, defendant himself agrees, in his appellate brief, that a defendant complaining of a violation of MCL 767.40a must establish prejudice in order to obtain relief. See *People v Williams*, 188 Mich App 54, 59-60; 569 NW2d 4 (1991).

Under the circumstances, defendant has not established prejudice. The trial court gave defense counsel ample time to prepare for VanPelt's testimony, given the substance of the proposed testimony and the information concerning the lack of witnesses to the conversation between defendant and VanPelt. The trial court was sensitive to defense counsel's needs and indicated a willingness to assist counsel in obtaining further information from the Sheriff's Department. We find no abuse of discretion and no basis for reversal. See, generally, *People v Lino (After Remand)*, 213 Mich App 89, 92-93; 539 NW2d 545 (1995), overruled on other grounds in *People v Carson*, 220 Mich App 662; 560 NW2d 657 (1996).

Defendant next argues that the trial court erred in refusing to instruct the jury on manslaughter. "The determination whether a jury instruction is applicable to the facts of the case lies within the sound discretion of the trial court." *People v Ho*, 231 Mich App 178, 189; 585

NW2d 357 (1998). "[W]hen a defendant is charged with murder, an instruction for voluntary and involuntary manslaughter must be given if supported by a rational view of the evidence." *People v Mendoza*, 468 Mich 527, 541; 664 NW2d 685 (2003).

On appeal, defendant does not make any reasoned argument with regard to involuntary manslaughter but instead focuses on voluntary manslaughter.

The trial court ruled as follows concerning defendant's request for a manslaughter instruction:

> All right, I'm not satisfied based on the record in this case, that manslaughter is supported by a rational view of the evidence. I am giving second degree, also requested by the defense.
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> But I'm not satisfied that manslaughter in either theory, voluntary or involuntary, is properly supported by a rational view of the evidence. The Defendant's testimony is that he . . . did not commit this at all, was not present and based on the testimony of witnesses, while I think the evidence could be – or that the death could be second degree murder, that that is supported by a rational view of the evidence, I don't find there's sufficient basis for a finding of – for an instruction on manslaughter in either of its theories.

The trial court did not err in reaching this conclusion. As noted in *People v Townes*, 391 Mich 578, 590; 218 NW2d 136 (1974), "[a] defendant properly convicted of voluntary manslaughter is a person who has acted out of a temporary excitement induced by an adequate provocation and not from the deliberation and reflection that marks the crime of murder." See also *Mendoza*, 468 Mich at 540. The evidence produced at trial did not support that defendant "acted out of a temporary excitement induced by an adequate provocation and not from the deliberation and reflection that marks the crime of murder." *Townes*, 391 Mich at 590. Defendant denied being the person on the video surveillance tape that captured the stabbing. Evidence indicated that defendant had planned to kill the victim, and there was no evidence of provocation on the part of the victim. The trial court properly denied the request for a manslaughter instruction.[2]

[2] Even though defendant does not make a reasoned argument with respect to this issue, we note that an instruction on involuntary manslaughter was also not supported by the evidence. Indeed, the evidence surrounding the brutal stabbing did not support a finding of a lack of malice. See *Mendoza*, 468 Mich at 540-541.

Defendant lastly argues that the trial court erred in scoring offense variable (OV) 19 of the sentencing guidelines.[3] "A sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score. Scoring decisions for which there is any evidence in support will be upheld. Additionally, we review de novo as a question of law the interpretation of the statutory sentencing guidelines." *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006) (citations omitted).

Defense counsel objected to the scoring of OV 19 at ten points, stating:

> I think that should be scored zero. The fact that my client denied committing this crime and has been consistent in that throughout the entire process, I don't see that that rises to the level of interfering with or attempting to interfere with the administration of justice. My client has done nothing but exercise his rights in this through his admission – or his . . . telling the [c]ourt and telling the jury that he did not do this.

The prosecutor responded:

> I view his conduct as completely different than as just described. I mean if you – if you look at the entire course of conduct and the way he attempted to elude police, and – and the issues bringing forth what I would consider false testimony, I think he – he should – his appropriate scored [sic] and should be given those points.

The court stated, "I'm satisfied there's a sufficient basis to conclude interference under offense variable 19 to the level of 10 points."

MCL 777.49(c) states that ten OV points should be assessed if "[t]he offender otherwise interfered with or attempted to interfere with the administration of justice[.]" Providing a false name to the police is an act encompassed by the statute. *People v Barbee*, 470 Mich 283, 288; 681 NW2d 348 (2004). The statute encompasses a broad range of acts that interfere with the investigation of a crime. See, generally, *id*. at 286-288. Given the changing stories defendant related to the police, we find no error in the scoring of OV 19.

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[3] Defendant does not argue for resentencing but merely requests the correction of the alleged scoring error. Indeed, defendant concedes that even if OV 19 were scored at zero, his guidelines range would not change. As noted in *People v Francisco*, 474 Mich 82, 89 n 8; 711 NW2d 44 (2006), "[w]here a scoring error does not alter the appropriate guidelines range, resentencing is not required."

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell
/s/ Patrick M. Meter